MALAYAN BANKING BHD

v.

EDARAN PIT STOP SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: D5-22-440-1992]
23 SEPTEMBER 1999

CONTRACT: *Guarantee - Joint guarantee - Clause stating creditor may discharge any guarantor without affecting rights against other guarantors - Creditor discharged one guarantor of liabilities upon payment of money - Whether acceptance of money from one guarantor discharges all guarantors of liability under guarantee - Whether acceptance of money amounts to part-payment of debt without prejudicing creditor's rights against other guarantors*

CONTRACT: *Guarantee - Continuing guarantee - Clause stating guarantee not affected even if other guarantees secured for same debt - Whether liability of guarantor preserved even if same debt secured by another guarantee*

CONTRACT: *Guarantee - Variation - Clause allowing creditor to be at liberty to determine, enlarge or vary any credit without consent of guarantor - Whether creditor may vary interest rates without notifying guarantor - Whether guarantor discharged from obligations under guarantee by such variation - Contracts Act 1950, s. 86*

CONTRACT: *Guarantee - Construction - Conclusive evidence clause - Effect of -Whether guarantor bound by clause - Whether issuance of statement by creditor stating amount owed conclusive against guarantor*

The plaintiff had granted various banking facilities to the first defendant ('the principal debtor') and to secure the grant of these facilities, the second, third and fourth defendants executed a guarantee ('the guarantee'). The plaintiff had earlier obtained final judgment against the principal debtor on the issue of whether the agreement between them allowed for the computation of interest in the manner claimed by the plaintiff. Subsequently, the plaintiff obtained summary judgment against the fourth defendant for a specified sum of money. Being dissatisfied, the fourth defendant filed this appeal. The fourth defendant contended that there were, *inter alia*, the following triable issues: (i) whether the computation of interest was correct notwithstanding the fact that the guarantee contains a conclusive evidence clause that a statement from the plaintiff as to the amount owed is conclusive against the guarantors; (ii) by varying the interest rates without the fourth defendant's consent, the fourth

defendant was discharged from his obligations under the guarantee pursuant to s. 86 of the Contracts Act 1950; (iii) as the plaintiff had issued various letters of offer, the plaintiff had intended the banking facilities granted to be secured by fresh guarantees in place of the guarantee; and (iv) whether by accepting a certain sum of money from the second defendant, the plaintiff's claim had been extinguished thereby discharging the fourth defendant from all liabilities under the guarantee.

Held:

[1] The final judgment entered against the principal debtor settles the quantum in respect of the fourth defendant's liability as guarantor. It would be totally inconsistent if a judgment for a different sum is entered against the fourth defendant as guarantor.

[2] To ascertain the liability of a party to be bound by a conclusive evidence clause, each case has to be construed in the light of its own facts. In the instant case, the letters of offer clearly reserved to the plaintiff the right to vary interest at their discretion without the requirement of notice having to be given.

[3] The guarantee contained a clause that the plaintiff was at liberty to "…determine, enlarge or vary any credit…" without having to obtain the guarantor's consent. By signing the guarantee, the fourth defendant had expressly agreed that the plaintiff need not revert to him nor obtain his consent to determine, enlarge or vary any credit. The words contained in the guarantee are wide enough to cover the situation where the plaintiff varies the interest rates imposed on the banking facilities given to the principal debtor.

[4] As the guarantee included a clause to the effect that the guarantee would not be affected by the securing of other guarantees, the liability of the guarantor is clearly preserved whether or not there is another guarantee in respect of the same debt. In any event, there is only one guarantee in the instant case. The guarantee was not revoked and was expressly stated to be a continuing guarantee.

[5] The money paid by the second defendant was received by the plaintiff as part-payment of the debt owed by the principal debtor. By cl 13 of the guarantee, the plaintiff may release the second defendant from his liability under the guarantee without prejudice to the plaintiff's rights as against the other guarantors.

[Appeal dismissed.]

Case(s) refererd to:
Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(foll)***
Credit Corp (M) Bhd v. Lucky Heights Development Sdn Bhd [1996] 4 MLJ 556 ***(refd)***
Dobbs v. The National Bank of Australasia Ltd [1935] 53 CLR 643 ***(refd)***
Herbert v. R [1941] 64 CLR ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 86

Other source(s) referred to:
Stroud's Judicial Dictionary of Words and Phrases

For the appellant - JD Goonting; M/s ML Lum & Co
For the respondent - ML Lau; M/s Shook Lin & Bok

Reported by Izzaty Izzuddin

JUDGMENT

RK Nathan J:

The Appeal

This is the 4th defendant's appeal against the decision of the learned senior assistant registrar given on 3 April 1996 allowing with costs the plaintiff's application for summary judgment for the sum of RM262,524.42 together with interest thereon at the rate of 3% above the Base Lending Rate on monthly rests from 1 January 1992 till the date of full payment and additional interest at the rate of 1% per annum on monthly rests on the total balance outstanding as at 1 January 1992 till the date of full payment and costs. On 14 August 1996 I dismissed the appeal with costs.

The Delay

At the outset I must say that whilst I left the Commercial Division as of 31 December 1996 the first time I became aware of this appeal was on 11 August 1999 when I received a letter dated 9 April 1999 from the 4th defendant's solicitors.

It is important that counsel pursuing an appeal ascertain the correct court to which the letter ought to be sent. The appellant's solicitors who are from Kuala Lumpur ought to have known that I am no longer in the Commercial Division and that it is clearly not the duty of the present judge of D5 to write this judgment. Counsel's lackadaisical attitude has caused unnecessary delay in this matter.

Facts

The plaintiff's claim against the 4th defendant is pursuant to a guarantee dated 19 October 1983 (the guarantee) given to secure the grant of various banking facilities and in particular an overdraft facility (overdraft facility) to the 1st defendant company, Edaran Pit Stop Sdn Bhd (principal debtor). The sums claimed by the plaintiff are in respect of amounts claimed to be due outstanding and payable by the principal debtor under the overdraft facility.

The agreement for the grant of the banking facilities between the plaintiff and the principal debtor arises from the plaintiff's letter of offer dated 17 May 1983 as varied from time to time by the plaintiff's letters of offer dated 8 July 1983, 13 October 1983, 28 March 1985, 12 March 1986 and 9 May 1988 respectively.

Findings Of The Court

The 4th defendant contends that there are various triable issues.

(1) Correctness Of Computation Of Interest

The 4th defendant submits that the liability of the 4th defendant as guarantor is only "secondary" to the liability of the borrower. I do not understand what he means by stating that the guarantor's liability is "secondary" to the liability of the borrower.

On 19 August 1996 I delivered a judgment on this matter wherein I had already considered and decided in favour of the plaintiff and against the 1st defendant on the issue of whether the letters of offer allow for the computation of interest in the manner claimed. It would be totally inconsistent if I do not enter judgment for the same sum against the 4th defendant as guarantor.

In any event I hold that the issue of the letters of offer is irrelevant to the 4th defendant's liability to the plaintiff which arises from a guarantee dated 19 October 1983. In fact even the 4th defendant concedes to this in his submission when he said "... the 4th defendant's liability to the plaintiff must necessarily be measured against and dependent upon such sums that the plaintiff may properly and lawfully claim against the Principal Debtor." Clearly the 4th defendant's liability arises under the guarantee document. Pursuant to the guarantee the 4th defendant agreed, *inter alia*, to pay on demand all monies due by the borrower including interest. It is my judgment that the final judgment I had entered against the borrower on 19 August 1996 settles the quantum in respect of the 4th defendant's liability as guarantor.

The Conclusive Evidence Clause

Further, the guarantee contains a conclusive evidence clause. Clause 9 of the said guarantee states:

> A Statement signed by your manager, sub-manager, secretary or any one of your officers as to the moneys and liabilities for the time being due or incurred to you from or by the customer shall be final and conclusive evidence against me/us for all purposes.

The plaintiff has already issued a statement as to the amount owing from the borrower and the said statement is shown as an exhibit in an affidavit affirmed on behalf of the plaintiff.

In *Citibank N.A. v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 the Federal Court said at p. 284 as follows:

> In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus 'A Certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives.' It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate ... .

I find that the conclusive evidence clause in the guarantee signed by the 4th defendant herein is similar to the clause discussed in *Citibank N.A*. In the circumstances, I am bound by the said decision of the Federal Court which adopted the principle set out in *Dobbs v. The National Bank of Australasia Ltd* [1935] 53 CLR 643. In *Dobbs* case the High Court of Australia said at p. 651 that:

> The clause means what it says, that a certificate of the balance due to the bank by the customer shall be conclusive evidence of his indebtedness to the bank.

Whilst I agree that there are numerous decisions regarding the conclusive evidence clause and that some have considered and upheld the view that the court can look beyond the conclusive evidence clause, to ascertain the liability of the party to be bound by the clause, it is my judgment that each case has to be construed in the light of its own facts. In fact, the 4th defendant referred me to my own decision in *Credit Corp (M) Bhd v. Lucky Heights Development Sdn Bhd* [1996] 4 MLJ 556 wherein I had held that no claimant should be allowed to hide behind a conclusive evidence clause and be allowed to make unlawful demands against its borrowers or

guarantors. However, I must remind myself that in Lucky Heights Development I had held that the claim against the borrower had not been established as there was an issue as to the variation of interest without notice. In the case before me the letters of offer clearly reserved to the plaintiff the right to vary interest at their discretion without the requirement of notice having to be given.

(2) Discharge By Variation Of Terms Of Agreement Between Principal Debtor And Creditor

No doubt as pointed out by the 4th defendant there have been variations of the interest rates. The 4th defendant seeks to emphasise that his consent was not obtained with regard to the variation of the interest rates. However, I note that in each and every letter of offer the plaintiff has expressly reserved its right to vary the interest imposed on the borrower's overdraft facility.

On this issue the 4th defendant has sought the protection of s. 86 of the Contracts Act 1950 (the Act). The said section reads as follows:

> 86. Discharge of surety by variance in terms of contract.
>
> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

The 4th defendant thus argued that he has raised a triable issue as to whether the 4th defendant is discharged from his obligations under the guarantee by virtue of s. 86 of the Act as there are variations on the terms of the agreement between the plaintiff and the 1st defendant, the borrower. However, a relevant cl. 12 of the guarantee is reproduced and it reads as follows:

> I/We hereby agree that you shall be at liberty without any further consent from me/us and without thereby affecting my/our liability under this guarantee at any time to determine enlarge or vary any credit to the customer ... .

To my mind the interpretation of this clause is purely a question of law and that it does not raise a triable issue. It is my judgment that by signing the guarantee containing the said cl. 12, the 4th defendant had expressly agreed that the plaintiff need not revert to him nor obtain his consent to determine, enlarge or vary any credit. I interpret the words "to determine" as giving the plaintiff the right to terminate the borrower's facilities. Similarly I interpret "to enlarge" as giving the plaintiff the right to increase the credit of the borrower and needless to say that the guarantor's liability being limited always to the amount stated in the guarantee document. I

also interpret "to vary" as giving the right to the plaintiff to alter or change the terms of the banking facilities given to the borrower. It is my judgment therefore that the words contained in cl. 12 are wide enough to cover the situation where the plaintiff varies the interest rates imposed on the banking facilities given to the 1st defendant. I reject the 4th defendant's submission that the clause is only wide enough to cover variations on the "credit limit" afforded to the borrower and not wide enough to include a variation in the interest imposed on the facility. It is my judgment that if the intention of the parties was as contended by the 4th defendant the words "credit limit" and not "credit" would have been used in the said clause. In fact the word "credit" is defined in *Stroud's Judicial Dictionary of Words and Phrases* with a quote from McTiernan J in *Herbert v. R* [1941] 64 CLR. It reads as follows:

> In commercial and financial affairs the word 'credit' may signify the financial arrangement in a transaction or the reputation for solvency and honesty which entitles a person desirous of incurring a debt or liability to do so on the terms that payment is to be deferred. In its former meaning it includes the delivery of goods or the advancing of money with the trust that the debtor will have the means to pay and will pay at a future date ...

It is my judgment that the word "credit" in cl. 12 of the guarantee refers to the limit of the value of the banking facilities to be granted to the principal debtor be it for letters of credit, or trusts receipts or the overdraft facility.

(3) Parties' Intention To Replace Guarantee With New Guarantee

The 4th defendant contends that upon the issuance by the plaintiff of the various letters of offer, the plaintiff had intended that the banking facilities as granted to the principal debtor, be secured by fresh guarantees in replacement of **the** guarantee (emphasis provided). To my mind this is a futile presumption. If indeed there had been a second guarantee executed then I can see the relevance in seeing the various intentions given to both the guarantees. But in this case there is only one guarantee as the said guarantee has not been revoked and is expressly stated to be a continuing guarantee, which would not be prejudiced by any existing or future guarantees with respect to the same debt. The 4th defendant's attempt at ferreting out a guarantee from the existing letters of offer is, to put it plainly, an attempt to make something out of nothing. In fact cl. 5 of the guarantee states as follows:

> This guarantee shall be without prejudice to and shall not be affected nor shall I/we or any of us be released or exonerated by any of the matters following:

(i) any securities negotiable or otherwise including other guarantees which you may now or at any time hereafter hold from the customer or any other person or persons in respect of any money hereby guaranteed ...

I hold without reservation that on the construction of the clause relating to the continuation of the guarantee and cl. 5, as stated above, the liability of the guarantor is clearly preserved whether or not there is another guarantee in respect of the said debt.

(4) Discharge By Settlement

The 4th defendant also contends that there is a triable issue as to whether a settlement has been concluded between the plaintiff and the principal debtor, the terms of which have discharged the 4th defendant from all liabilities under the guarantee.

To my mind an examination of the correspondence between the principal borrower and the plaintiff clearly shows that settlement was contemplated but was never concluded between the parties. There is only one letter which the plaintiff has written dated 8 January 1992 in reply to the 4th defendant's four letters and this letter expressly sets out the terms on which settlement was to have been effected. The plaintiff had stated in the said letter that its management had approved the 1st defendant's request for a further fourteen days' extension of time to pay the settlement sum of RM200,000 together with monthly interest from April 1991 to December 1991 totalling RM22,026.94 and the legal fees of RM1,189 on or before 15 January 1992. It was thus expressly reserved in para. 4 of the said letter that:

Should we receive no cooperation from you, we may have to take legal action to recover the full amount owing against you and your guarantors.

In my view, this letter is explicit. Since the 1st defendant had failed to effect payment on or before the deadline of 15 January 1992 the "settlement" was never effected.

To the 4th defendant's argument that it is a triable issue whether the payment of RM200,000 received from the 2nd defendant extinguishes the claim of the plaintiff entirely, I find that the evidence shows that the proposed settlement was to have been between the 1st defendant and the plaintiff whereby payment was to have been effected by 15 January 1992. Since the letter dated 8 January 1992 from the plaintiff expressly reserved its right to proceed with recovery of the full amount due and owing in the event of a default, the plaintiff was entitled to proceed with recovery of the full amount owing (which added up to well over RM200,000) when

the settlement fell through by reason of non-compliance, by the 1st defendant. I also note that when the 2nd defendant subsequently made the payment of RM200,000, it was received by the plaintiff as part-payment of the debt owing under the 1st defendant's account. The plaintiff then agreed to release the 2nd defendant from his liability under the guarantee without prejudice to its rights as against the other guarantors. It must be noted that cl. 13 of the said guarantee clearly preserves the plaintiff's rights in this respect. Clause 13 reads as follows:

> You shall also be at liberty to release or discharge any of us from the obligations of this guarantee or to accept any composition from or make any other arrangements with any of us without thereby prejudicing or affecting your rights and remedies against the other or others of us.

In the circumstances it is my finding that there are no triable issues.

(5) Introduction Of New Terms

The 4th defendant argued that the plaintiff's letter dated 8 January 1992 had unilaterally introduced new terms after a concluded agreement between the plaintiff and the 1st defendant and that the original agreement did not make a provision for the payment of interest or revival of the plaintiff's original claims nor did the letter dated 8 January 1992 itself make an express provision as to the revival of the original cause of action. This cannot be so because there was never any concluded settlement between the 1st defendant and the plaintiff and that the 1st defendant had not met the terms and conditions for settlement set out by the plaintiff in its only letter dated 8 January 1992 in reply to the 1st defendant's earlier four letters. In the circumstances this argument must fail.

In my view this was a proper case for summary judgment. I therefore dismissed the appeal with costs.